No. 2395.

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CENTRAL NATIONAL FIRE INSURANCE COMPANY OF CHICAGO, ILLINOIS, a Corporation,
*Plaintiff in Error,*

vs.

WILLIAM BLACK,
*Defendant in Error.*

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

## Brief of Defendant in Error



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### STATEMENT OF THE CASE

This action was instituted by defendant in error to recover the sum of $5000.00, based on a contract of insurance. The complaint alleges that on a date certain plaintiff was the owner of a stock of mer-

chandise, consisting principally of wines, liquors, cigars, beer and soda and mineral waters; that on June 18th, 1912, in consideration of the premium of $137.50, the plaintiff in error, insurance company, issued to defendant its policy of insurance. whereby it insured the defendant for the term of one year "against all direct loss or damage by fire, . . . . . to an amount not exceeding Five Thousand Dollars, . . . . on his stock of merchandise, consisting principally of wines, liquors, cigars, beer, soda and mineral water and all other goods, wares and merchandise not more hazardous kept for sale by assured, while contained in two-story shingle roofed frame building and adjoining and communicating additions thereto, while occupied as saloon and situated on Lot 6, Block 6, Tinker's North Addition to Long Beach, Pacific County, Washington."

The policy was issued on June 18th, 1912, and duly countersigned by Henry Kayler, agent of the company at Long Beach, Washington. On June 27th, 1912, the property so insured was *totally* destroyed by fire. Immediate notice of the loss was given, and formal proof of said loss was made out and served on the company on August 23rd, 1912.

The policy in question contained the following, among other provisions:

> "If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the dam-

aged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon. . "

"The insured, as often as required, shall exhibit to any person designated by this company, all that remains of any property herein described, and submit to examinations under oath by any person named by this Company and subscribe the same; and, as often as required, shall produce for examination all *books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this Company*, or its representative, and shall permit extracts or copies thereof to be made."

About two weeks after the fire one W. G. Lloyd, an adjuster in the employ of the defendant, went to Long Beach, the place where the fire occurred, to make an investigation, but did not visit or talk with the plaintiff in this action. (Tr. pp. 263-264). This visit was evidently made in response to a telegram sent to Davenport Dooley & Co., of Portland, Oregon, agents of the defendant, by Henry Kayler, agent of the company at Long Beach, Washington, which telegram is as follows:

"Long Beach, Wn., June 27, '12.

"Davenport Dooley & Co.,

"Portland, Ore.

"Risk covered by policy 590757 burned this morning, prosecuting attorney on spot investigating. Total loss.

"P. KAYLER, Agent."

(Tr. p. 432.)

On July 3rd, 1912, plaintiff wrote to Davenport Dooley & Company as follows:

"July 3rd, 1912.

"Davenport Dooley Co.,

"Portland, Ore.

"Dear Sir:

"I have *meet* with a loss on June 27 *with* doubtless you have been notified. Now I wish you to send adjuster or representative as I wish to clean up premises in order to rebuild. Rours Respect.,

"WM. BLACK."

(Tr. p. 456.)

No reply was ever made to this letter. On August 19, 1912, plaintiff wrote to Mr. W. G. Lloyd, adjuster of defendant insurance company at Portland, Oregon, as follows.

"Long Beach, Wash., Aug. 19th, 1912.

"Mr. W. G. Lloyd,

"Portland, Ore.

"Dear Sir:

"I have been waiting since June 27 for

you to come down and inspect the site of my building that was burnt on that date. I wish to clear up the rubbish from place, but do not want to touch anything till you have *been* it. Mr. Whalley of the New Hampshire Ins. Co. refers me to you hence this letter.

"I wish you would make it a point to come as soon as possible.

Yours respect'y,

"WM. BLACK."

(Tr. p. 460.)

To the above letter reply was made as follows:

"Mr. Wm. Black,

"Long Beach, Wash.

"Dear Sir:

"I have your letter of August 19th, relative to purported claim by reason of fire and in reply I beg to advise as follows:

"If you have a claim under Pol. Co. 590757 issued to you by the Central National Fire Ins. Co. of Chicago, Ill., and Pol. No. 2661130 issued to you by the New Hampshire Fire Ins. Co. of Manchester, N. H., both of which companies I represent and on behalf of said companies I desire to call your attention to the terms and conditions as set forth in lines frim 67 to 112 inclusive.

"You are hereby required to submit proofs of loss as set forth and in accordance with

instructions thereby given in said policies, within sixty days of the fire.

"Upon above compliance I will give the matter attention.

"The said Insurance Companies, above referred to, hereby neither admit nor deny liability."

(Tr. pp. 464-465.)

This communication was replied to by plaintiff as follows:

"Long Beach, Wash., Aug. 23, 1912.

"Mr. Lloyd,

"Portland, Ore.

"Dear Sir:

"Enclosed please find Proofs of Loss as requested. Very respect'y,

"WM. BLACK."

(Tr. p. 459.)

On August 29, 1912, plaintiff again wrote Davenport-Dooley & Company as follows:

"August 29, 1912.

"Davenport-Dooley Co., Portland, Ore.,

"Agents of Central National Fire Insurance Comp. of Chicago, Ill.

"Dear Sir:

"I hold Policy No. 590757 on this Company and have been awaiting for settlement of policy since June 27 and I think I have been treated *veary roten;* have had no one to

come here to *ajust* my loss or give me any information. Now I demand an *emeadite* settlement or I will at once take steps to *colect* it.

"Yours truly,

"WM. BLACK.

"Please let me *here* from you at once."

(Tr. p. 458.)

On August 31st, 1912, W. G. Lloyd the adjuster of the defendant insurance company wrote the plaintiff as follows:

"August 31st, 1912.

"Mr. Wm. Black,

"Long Beach, Wash.

"Dear Sir:

"I am in receipt of your favor of the 23rd, enclosing papers purporting to be proofs of loss under policy No. 590757 and policy No. 2661130 issued to you by the Central National Fire Ins. Co., and the New Hampshire Insurance Co. The same will be given consideration and you will be advised further at the earliest possible moment."

(Tr. pp, 462-463.)

Again on September 10th, 1912, defendant, through its general agents addressed a letter to the plaintiff as follows:

"September 10th, 1912.

"Mr. Wm. Black,

"Long Beach, Wash.

"Dear Sir:

"We are in receipt of your favor of August 23rd, enclosing papers purporting to be proofs of loss under policy No. 590757 issued to you by the Central National Fire Insurance Company, making claim for loss by fire alleged to have occurred on June 27th, 1912.

"The said papers can not be accepted as satisfactory, for the following among other reasons which may subsequently be made to appear:

"The list of articles inumerated is only a memorized list and also contains articles which are not items of stock.

"The amount set forth in said list as representing the value are grossly in excess of the true sound value of said articles, alleged to have been destroyed.

"Under the terms and conditions of your policy you are required to exhibit *the last authentic inventory* taken of your stock or a certified copy thereof. You will also supply *bills of purchases of stock since the last said inventory,* or if said bills of purchases have been destroyed then certified copies of the original bills.

"You are also required to supply a record

of your sales made of stock since the date of inventory above referred to.

*"The said papers cannot therefore be accepted as satisfactory and are held subject to your order.*

"This company hereby neither admits nor denies any liability to you. (Italics ours.)

(Tr. pp. 463-464.)

To this letter Black replied as follows:

"Sept. 12th, 1912.

"Mr. W. G. Lloyd,

"Adjuster Fire Losses,

"Portland, Ore.

"Dear Sir:

"Your letters of Sept. 10th have been referred to my lawyers.

"Yours truly,

"WM. BLACK."

(Tr. p. 459.)

On October 9th, 1912, W. C. Lloyd, adjuster for defendant insurance company, again wrote plaintiff as follows:

"October 9th, 1912.

"Mr. Wm. Black,

"Long Beach, Wash.

"Dear Sir:

"On September 10th, 1912, we wrote you requesting further data and information relative and supplemental to papers filed by

you under policy No. 590757 issued to you by the Central National Fire Insurance Company.

"To this you replied on September 12th, 1912, that you had referred the matter to your lawyers, and since which time nothing further has been heard. If you intend making any claim, we notify you that you comply with our request of September 10th, 1912, above referred to."

(Tr. p. 462.)

To this letter Black replied under date of October 11th, 1912, as follows:

"Oct. 11th, 1912.

"W. G. Lloyd,

"Portland, Ore.

"Dear Sir:

"What has struck you? I have complied with the law. Send you with proof of loss *witch* you refuse to receive as such and claimed in your letter that it was a memorised list. As far as I am or was concerned that letter closed the matter between you and me. I have been treated *roten* by you. You have never called on me and I never saw you. This has been my first fire and I have had no *exsperince* in *maters* of this kind and want no more. I *inshured payed* my money and have *meet* with a loss and want mine and I am going to have it; and take this from me

I have furnished you with everything covering this my loss.

"WM. BLACK."

(Tr. p. 461.)

We have set forth all the correspondence that took place between the parties to this action, to the end that this court may determine whether or not the contention of counsel for the insurance company that plaintiff violated any of the terms and provisions of the policy in question is well taken.

The affirmative defenses plead by the insurance company were as follows:

1st. A violation of the terms and provisions of the policy in that the plaintiff "refused to produce for the examination of this defendant any bills, invoices, or other vouchers of any goods, or certified copies thereof, or any inventory thereof."

2nd. Fraud and false swearing.

3rd. That the fire which brought about the loss "was caused by the act, design or procurement of the plaintiff, and not otherwise."

4th. That the value of plaintiff's stock of goods at the time of the fire did not exceed the sum of $1000.

We feel safe in observing that not the slightest attempt was made on the trial of the action to substantiate any of the defense interposed, counsel for the defendant contenting themselves with attacking the reputation of plaintiff and his witnesses

for truth and veracity, in which attack Henry Kayler, the agent of the insurance company, was not immune. Not the slightest attempt was made on the part of the insurance company to prove that the stock of goods was not of the value claimed by Black, and all attempts to substantiate the defense that the plaintiff was guilty of arson was abandoned upon the trial of the case if it ever was seriously intended to be urged as a defense. In attempting to make out that the plaintiff was guilty of false swearing in attempting to defraud and deceive the company, it appeared that in making out his proof of loss plaintiff inadvertently included certain items of personal property which were destroyed by the fire, but which were not covered by the policy of insurance. It will be noted from an examination of the provisions of the policy that it covered his stock of merchandise consisting principally of "wines, liquors, cigars, beer, soda and mineral water and *all other goods, wares and merchandise* not more hazardous, etc." In making out the proof of loss, which proof of loss was written and constructed by Henry Kayler, agent of the defendant insurance company there was included several items of personal property, such as bottles, towels, corkscrews, lemon squeezers, corks, decanters, glasses, etc. It was testified to by Kayler that at the time he drew the proof of loss he was laboring under the honest impression that these items of personal property were covered by the policy. The testimony in that respect is as follows:

Q. "Now, Mr. Kayler, in making out this proof of loss there is some items included that do not seem to be covered by the policy, such as bottles and towels and so on?"

A. "I supposed it was all a part of the stock when I put it down. I never made out any proof of loss. My business was to write it up, the adjuster did that work generally."

Q. "You sent the proof of loss to the company or adjuster?"

A. "Yes, sir."

Q. "At the time you included those goods, did you believe that those articles I have called your attention to, that they were covered by the policy?"

A. "Sure."

Q. "When you included these articles, was there any intention on your part to defraud the company?"

A. "No, sir; I supposed everything inside of that saloon was covered."

(Tr. pp. 128-129.)

The testimony of plaintiff on this aspect of the case was substantially the same as that of Kayler. (Right here it is just as well to direct the attention of the court to the fact that a certain inventory found on pages 445 to 451, inclusive, of the transcript is separate and distinct from the proof of loss found on pages 432 to 436, inclusive, of the transcript.)

Upon the question of the plaintiff's alleged at-

tempt to defraud the company by including in his proof of loss items not covered by the policy, the lower court charged the jury as follows:

> "There has been some argument about some items covered in his proof of loss that were not covered in the policy. The policy showed that the man was engaged in the saloon business and selling liquors and cigars, and soda waters and other matters that went to make up his saloon business. The merchandise which he was selling were the things that were insured. If he included towels, glasses and matters that he used in the saloon business, if it was so plain on the face of it that they were not covered by the policy that he could not deceive the insurance company, then the court instructs you there would be no fraud on his part simply by including items in there that the defendant insurance company would be presumed to know of by going over the form of the policy they used and they could learn that these things were not covered by the policy itself because it was confined to liquors and such things as saloon-keepers would sell."
>
> (Tr. p. .)

Further on the court charged the jury:

> "If you find from the evidence that Henry Kayler, who was the defendant's agent in issuing the policy, assisted the plaintiff or

acted on his behalf in making out or submitting the proof of loss, that would be no defense to the plaintiff, as said Henry Kayler was not authorized or empowered by the defendant to make out, or assist the plaintiff in making out his proof of loss.

"You are further instructed that the said Henry Kayler in assisting the plaintiff in making out and submitting his proof of loss to the defendant, acted as agent for the plaintiff and did not represent the defendant in that connection in any manner whatsoever.

"You understand the fact that Henry Kayler was the man that did make out the proof of loss, that was a circumstance that you would be authorized to consider in determining whether or not the plaintiff is guilty of fraud, whether he would be likely to go and pick out an agent of the company to prepare a proof of loss." (Tr. pp. 428-429.)

These instructions were not excepted to by counsel for the insurance company. On the trial of the action it was shown by undisputed testimony that plaintiff had been engaged in the saloon business for a number of years, his first saloon being located at Ilwaco, some few miles from Long Beach, to which latter place he had removed, and that at the time he first entered business he carried the highest grades of wines, liquors and cigars that money

could purchase. S. A. Madge, a witness on behalf of the plaintiff, who was formerly in the Internal Revenue service, in his official capacity as such made various visits to Mr. Black's saloon at Ilwaco and Long Beach, testified that he was so impressed with the stock of goods that plaintiff carried that he made an investigation to find the reason therefor, which investigation ended favorably to plaintiff. Madge testified that all of the liquors carried by Black in his saloon at Ilwaco were what is known as "double stamped goods," and that he did not have a barrel of rectified liquors in his place of business. Other witnesses also testified as to the high grade character of the stock of liquors, wines and cigars that Mr. Black carried in stock while running saloons both at Ilwaco and Long Beach. The proof was overwhelming that at the time of the fire his stock of goods was of a value in excess of the amount of insurance carried thereon. The trial in the court below resulted in a verdict in favor of the plaintiff in the sum of $5000.00. A motion for new trial was overruled and judgment entered on the verdict, and the case now comes to this court for further disposition.

## ARGUMENT

### I.

Learned counsel for plaintiff in error argues that there is error:

1st. In the admission of evidence concerning the value of the goods destroyed by fire.

2nd. In denying the motion for non-suit, which was predicated upon the ground "that the plaintiff refused to furnish defendant with copies of his purchases and invoices and his refusal to perform any of the other conditions in the policy on his part to be performed; and for the further reason that the market value of the property has not been shown." (Tr. p. 259.)

3rd. In denying the motion for a directed verdict based on the proposition that "plaintiff was guilty of false swearing in connection with his loss in violation of the terms of the policy." (Tr. p. 410.)

4th. In denying the motion to set aside the verdict and judgment and grant a new trial.

5th. Error in refusing certain instructions and error in the giving of certain instructions.

In considering the question of whether or not there was reversible error in admission of testimony relative to the market value of the goods destroyed, it is well to ascertain what the lower court charged the jury on that subject. The instructions relative to market value are as follows:

"You have heard a good deal in this case about the opinions of witnesses regarding the market value. The way to arrive at that is if you determine that the market value of the stock covered by this insurance was greater than $5,000, and you find the other issues for the plaintiff, it would not be necessary for you to determine exactly how much it was, because the plaintiff cannot recover more than $5000.00. You would not have to figure exactly how much, if you concluded the stock was worth $5000, and find the other issues for the plaintiff; but if you could not find the other issues for the plaintiff and in figuring it up you find it was less than $5000, it would be necessary for you to determine what the market value of the merchandise—what the fair market value of it was at the time and place where it was burned. There has been a great deal of evidence admitted in the case about the cost in Kentucky, Portland, San Francisco, Seattle and other cities, and evidence concerning liquors and the sale for them at retail, and other matters of that kind, but they are only sidelights, evidence that has been admitted for your consideration in throwing a light on this question of probably what the value, the market value of this liquor and these cigars were at Long Beach at the time of the fire."

"The Court instructs you that the purpose of the policy is in case of an honest loss enabling the policy holder to make himself whole, that is, to replace the property he has lost. You will understand that the retail value at which liquors sell by the glass—you will not resort to that because if he had a large stock of goods, he did not have to buy it that way, he did not have to make himself whole by buying back at retail what he lost by fire. But the law presumes that a man will be able to make himself whole in all probability by buying back at the fair market value, and that is known and sometimes described as the value which one, having a piece of property, was willing to sell, at but did not have to sell, and another man—found a man willing to buy, but who did not have to buy, the price at which these two men would arrive at would be the fair market value. Another way of arriving at that would be the price that men would be compelled to pay for property where they go into the open market to buy. . . . . If you should find a verdict in favor of the plaintiff, the amount should be the actual market value of the property at the time of its destruction by fire, and no more." (Tr. pp. 415-417.)

These instructions which we have just quoted

were not excepted to by counsel for plaintiff in error.

The first error assigned of which we shall take notice is predicated upon the refusal of the court to sustain an objection to a question propounded to the witness Madge as to the extent and character of the stock of liquors carried by Mr. Black. It seems to the writer that this objection goes to the weight rather than the competency of the testimony. Mr. Madge had been a deputy Internal Revenue Collector for a number of years, and in his capacity as such, often visited Black's saloon, and in this way become acquainted with the stock of goods carried by Black. It was the contention of defendant in error that at the time of the fire he had several barrels of liquor on hand that he carried at Ilwaco, and that the stock of goods was of the same high grade character as he carried at Ilwaco when Madge was in the Revenue service, which contention was amply supported by the evidence on the trial of the case. This witness did not, as stated by counsel for plaintiff in error on page 46 of his brief venture, nor was he asked for his opinion as to the value of plaintiff's entire stock at the time of the fire, nor at any time prior thereto. The answer of plaintiff in error charged that the value of the stock of goods carried by plaintiff at the time of the fire did not exceed the sum of $1000.00, and it will also be noted that the defendant had charged the plaintiff with fraud, false swearing, arson, and all other crimes that are contained in the criminal

code, and the lower court in ruling on the objections of counsel as to the admission of this testimony, said:

> "The plaintiff is accused of fraud. Both the fact of the charge of fraud and the defense for the want of fraud, depends more or less on circumstances, and this is admitted and your objection overruled on the ground that it is a circumstance from which the jury may infer either fraud or want of fraud. (Tr. p. 70.)

The testimony of the witness Madge and the character and extent of plaintiff's stock in trade was amply supported by other witnesses whose knowledge of the same extended up to the date of the fire.

It is next assigned that the lower court committed error in the admission of the testimony of the witnesses Madge, Dickinson, Hagemeyer, and the plaintiff as to the market value of the goods destroyed. It is a well settled proposition of law that the question of the competency of a witness to testify rests largely in the discretion of the trial judge.

> *Meyers v. McAllister*, 103 N. W. 564;
> *Cleveland v. Rowe*, 109 N. W. 817;
> *Stevens v. Minneapolis*, 43 N. W. 842;

It is also just as well settled that unless it clearly appears that that discretion was abused by the trial

judge a reversal does not follow. The proposition is so elementary that it is needless to cite authorities in support thereof. To refute the idea that there was any error in the testimony of these witnesses, it is only necessary to read their testimony. The witness Madge had been in the Internal Revenue service for several years, and had acquired an expert knowledge and information as to the value of different kinds of liquors. He said he was acquainted with the value of double stamped liquors, and that their value depended upon their age. (Tr. pp. 70-73.) He then testified that Old Crow liquor of the vintage of 1900 had a value in 1912 of from $7.00 to $10.00 per gallon. (St. p. 73.) This witness did not testify anything about the value of plaintiff's stock as a whole. The witness Dickenson, after stating that he was familiar with the stock that Black carried, stated he did not know the value of the stock which Black carried "but it is way up in the thousands."

Q. "Do you know the amount and value of the liquors that Black had there?"

A. "No sir, I don't know the exact amount, I know it is way up in the thousands."

(Tr. p. 138.)

The answer is not very clear what the witness meant, but conceding that the witness intended to say that the value of the stock was thousands of dollars, it is not quite clear where any error was committed in refusing to strike the answer. Its

weight was solely for the jury. The witness Hagemeyer, who had been engaged in the liquor business for several years (Tr. p. 244-245) testified that he was acquainted with the brand of liquors known as Old Crow, Cedar Brook, Penwick Rye, and that he knew their fair market value, which he stated. No objection whatever was offered to his testimony on direct examination. On cross-examination he testified the price he had mentioned would not include retailer's profits. (Tr. 246.) The cross-examination was continued as follows:

Q. "If a man was to buy a barrel of any of these different brands and ages of liquors mentioned in June, 1912, you could not tell what he had to pay for it?"

A. "He would have to pay somewhere near I think those prices. (Prices that the witness had mentioned.)

Q. "*That would be to buy it by the barrel?*"

A. "*Certainly.*"

Q. "You did not buy any of those years?"

A. "Only in this way, I was in partnership and my partner did the buying and I paid the bills."

(Tr. p. 247.)

This was followed by a motion to strike the witness' testimony as incompetent. (Tr. p. 248.) Comment is unnecessary.

The plaintiff in his own behalf and without any objection testified that he had been engaged in the

saloon business for a number of years, did his own buying, knew the value of such goods as he carried, and without objection from counsel for defendant stated that the fair market value of the goods destroyed by fire was $8000.00. (Tr. p. 172.) It is true as stated by counsel that he was not acquainted with the wholesale price of Old Crow, McBrayer's and Penwick whiskies in 1912. But what of it. Other witnesses had so testified and plaintiff testified that he had in his saloon at the time of its destruction by fire 5 barrels of Old Crow (1905); 4 barrels of Cedar Brook (1903); 3 barrels Green River (1902); 3 barrels Penwick Rye (1904); 1 barrel of Old Crow (1899); 1 barrel of Fox Mountain (1896); 2 barrels of McBrayer's single stamp; 1 barrel Wicklow. On the question of values plaintiff had the benefit of the testimony of H. Armstrong, who had been engaged in the liquor business twenty years, who testified as to the value of the liquors plaintiff claimed to have lost by the fire. (Tr. pp. 238-244.) No assignment of error was predicated on the testimony of this witness. The defendant took the depositions of various witnesses who had been engaged in the wholesale liquor business and who had sold plaintiff liquors from time to time while he was engaged in running the saloon. Many of these depositions were offered and read in evidence by attorney for the plaintiff. The testimony of these various witnesses are illuminating on the question of values and sheds much light on the value of some of the liquors plain-

tiff claims to have lost by fire. We call the attention of the court to the deposition of Julius Friedland, (Tr. pp. 90-93); Robert F. Woelffer, (Tr. pp. 86-88); Joseph Greenbaum, (Tr. pp. 94-95); William P. Penwick (Tr. pp. 95-97); John Ecklund (Tr. p. 99); Monroe L. Bickart (Tr. pp. 131-133. These witnesses all testified as to the cost of certain liquors sold by them to Black. Defendant's witnesses C. R. Brinkley (Tr. pp. 346-7), E. J. Cramsie (Tr. p. 345), and E. W. Duffy (Tr. pp. 353-354), and others testified as to the value of certain brands of cigars sold to Black, which agree in all respects with the prices and values placed upon the same by Black in his inventory, a copy of which was attached to the proof of loss submitted to the insurance company. It can hardly be denied that the cost of an article is competent as tending to show its value.

*Ellsworth v. Aetna Ins. Co.*, 11 N. E. 355;
*Aetna Ins. Co. v. Weide*, 9 Wall. 677, 19 L. Ed. 810;
*Lumber Co. v. Wilmore*, 25 Pac. 556;
*Johnson v. Farmers' Fire Ins. Co.*, 64 N. W. 5.

The testimony of defendant's own witnesses as to the cost price of the goods if taken with the testimony of plaintiff's witnesses conclusively establishes what it would cost plaintiff to replace the stock of goods destroyed by the fire. At least their testimony as to the value of the goods became a

question for the jury to determine. Before closing this branch of the argument it is just as well to observe that the objections made by counsel to the testimony of Madge, Hagermeyer and Dickinson, et al., did not reach the precise point now argued by counsel on page 41 of his brief. The only objection made upon the trial was that these witnesses were not competent to testify as to values.

## II.

On pages 48 and 49 of the brief of counsel for plaintiff in error it is insisted that the plaintiff Black did not comply with that provision of his policy which reads as follows:

> "If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon, and within sixty days after the fire, unless such time be extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property;

the cash value of each item thereof and the amount of loss thereon. . . . ."

Until the brief of counsel for plaintiff in error was written we were not aware that it was claimed that plaintiff was in default as to this provision of the policy. No breach thereof was alleged in the pleadings and none was contended for on the trial of the action. It will be remembered that the loss sustained by the plaintiff was a *total* one. There was no property left to protect from further damage. Now, how under such circumstances plaintiff could separate the damaged and undamaged property, or put something that did not exist into the best possible order, or make a complete inventory thereof, we are at a distinct loss to know. The provision of the policy just quoted has reference to a case where the insured sustains a partial loss. Proof of total loss was submitted in the time limited in the policy and accompanying the proof of loss was a complete inventory which had been taken just a few days prior to the issuance and delivery of the policy of insurance. The motion for non-suit was predicated upon the ground, and only upon the ground, that the plaintiff "had refused to furnish defendant copies of his purchase and invoices, and his refusal to perform any of the other conditions of the policy on his part to be performed, and for the further reason that the market value of the property has not been shown." (Tr. p. 259.) The motion for a directed verdict was predicated upon

the ground "that the evidence showed conclusively that the plaintiff was guilty of false swearing in connection with his loss in violation of the terms of the policy, and therefore the policy was void. . . . " (Tr. p. 410.) In neither the motion for non-suit or directed verdict was the attention of the court ever called to the alleged fact that plaintiff had violated that provision of the policy which we have quoted above. Neither were any instructions requested on such a proposition.

III.

It is next argued that the motion for a non-suit should have been granted as the plaintiff cannot recover because of his alleged refusal "to submit to examinations under oath by any person named by this Company and subscribe the same; and, as often as required, shall produce for examination all books of accounts, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, or to perform any of the other conditions of the policy on his part to be performed." (Brief of counsel for plaintiff in error p. 51.) This statement of counsel is predicated upon the proposition that the plaintiff violated a condition of his policy, which required of him " . . . as often as required shall exhibit to any person designated by this company, all that remains of any property herein described, and submit to examinations under oath by any person named by this company and subscribe the same; and, as often as required, shall produce for examina-

tion all books of account, bills, invoices and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company, or its representative, and shall permit extracts or copies thereof to be made." This provision was, of course, written in the policy for the benefit of the company and according to the decisions of all the courts is to be strictly construed against the company. In other words, there must be a strict compliance with its terms before the assured can be put in default. The loss occurred on June 27, 1912, and on August 23, 1912, plaintiff submitted to the insurance company his proof of loss, accompaned with a complete inventory, which the proof showed was taken just a few days before the policy of insurance was written. On September 10, 1912, seventeen days after the receipt of the proof of loss, the insurance company by its duly constituted agent, wrote to the plaintiff as follows:

"September 10th, 1912.

"Mr. Wm. Black,

"Long Beach, Wash.

"Dear Sir:

"We are in receipt of your favor of August 23rd, enclosing papers purporting to be proofs of loss under policy No. 590757 issued to you by the Central National Fire Insurance Company, making claim for loss by fire alleged to have occurred on June 27th, 1912.

"The said papers can not be accepted as satisfactory, for the following among other reasons which may subsequently be made to appear:

"The list of articles enumerated is only a memorized list and also contains articles which are not items of stock.

"The amount set forth in said list as representing the value are grossly in excess of the true sound value of said articles, alleged to have been destroyed.

"Under the terms and conditions of your policy your are required to exhibit the last authentic inventory taken of your stock or a certified copy thereof. You will also supply bills of purchases of stock since the last said inventory, or if said bills of purchase have been destroyed then certified copies of the original bills.

"You are also required to supply a record of your sales made of stock since the date of inventory above referred to."

This letter is supposed to contain demand which put plaintiff in default by his alleged refusal to comply therewith. The inventory demanded was already in the possession of the company, although the provision of the policy which it is alleged the plaintiff violated does not call for the submission of an inventory, it simply requires plaintiff upon request to "*produce for examination all books of*

*account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company, or its representative, and shall permit extracts or copies thereof to be made."...* The demand was for the "last authentic inventory," and further, for *"bills of purchases of stock since the last said inventory, or if said bills of purchases have been destroyed, then certified copies of the original bills."* The demand did not ask for the production of any books of account, bills, invoices or other vouchers, or certified copies thereof, but only demanded that he supply "bills of purchases of stock since the last said inventory, or if said bills of purchases have been destroyed, then certified copies of the original bills." The demand did not require him to submit any books of account, bill of account, invoices or other vouchers covering purchases prior to the taking of the last inventory, and there is no proof in the record disclosing that any purchases were made between the date of the last inventory and the date of the fire. Neither was any place designated for the production of "bills of purchases of stock since the last inventory." No record was kept of any sales between the date of the inventory and the date of the fire (Tr. 191).

The motion for non-suit was properly denied for several reasons:

1st. The demand was for bills of purchase since "the last authentic inventory," while the motion for

non-suit was predicated upon the refual of the plaintiff to furnish defendant with copies of his purchases and invoices. (Tr. p. 259.)

2nd. The time and place for the production of bills of purchases since "the last authentic inventory" was not designated—hence the demand was insufficient to put the plaintiff in default.

3rd. The letter of September 10th, 1912, (Tr. p. 463) written by the defendant to the plaintiff is virtually a denial of all liability on the part of the insurance company.

With the proof of loss submitted by the plaintiff to the defendant was a copy of an inventory taken shortly before the policy was issued. The insurance company in its letter of September 10th, 1912, (Tr. p. 463) respecting the proof of loss claimed that it was a "memorized" list and demanded "an authentic inventory," coupled with a demand for "all bills of purchases of stock since the last said inventory." In other words it attempted to place a burden on the assured that his contract did not place upon him. They attempted to require of him the impossible, and now claim he is in default and his policy void by reason thereof. Instead of making a demand on the plaintiff in compliance with the provisions of the policy they made a demand not justified by the terms of the policy. What the insurance company would consider an "authentic inventory" and what would have satisfied them in that respect, we are not advised. However, we are

advised by their letter of September 10th, 1912, that they accuse plaintiff of fraud and false swearing, and that they rejected his proof of loss, and that they advise him that his proof of loss was held subject to his order. It is fundamental that a denial of liability on the part of the insurance company is a waiver of all conditions subsequent to be performed by the assured.

The letter of September 18th, written by the insurance company to Black was a denial of all liability for the loss, and if a denial of liability is waiver of proofs of loss, then denial of liability upon being furnished with proofs of loss is waiver of compliance with the terms of the policy, by assured.

After having accused plaintiff of fraud and rejecting his proof of loss the insurance company lost the right to demand compliance with any of the terms of the policy.

*Phenix Ins. Co. v. Luce*, 123 Fed. 259.

In the case just cited the assured claiming to have sustained a loss, submitted his proof of loss, and the company thereupon wrote him as follows:

> "It has come to us from sources of great reliability that before the fire to which you refer the building insured by this company under its policy 8,732 had fallen into a broken mass of valueless wreckage, and that the fire (so far as your property was concerned) destroyed nothing that was worth

preserving. If the information, coming to us from many trustworthy sources, is correct, the Phenix Co. is not liable for the loss you claim to have sustained.

"If it be not true that your building fell in ruins from its own weakness and was only a congeries of broken materials when the fire broke out, then we shall treat with careful consideration the evidence you may wish to offer in support of your claim. If, however, we are correctly informed (which we believe to be the case) concerning the circumstances of the disaster set forth in your affidavit, then there should be no controversy between us as to the matter of the claim, there clearly being no liability under our policy."

The assured construed the latter as a denial of all liability and commenced action. It was contended upon the trial that the action was prematurely brought and the court ruled to the contrary, and held that the letter was a denial of all liability.

The correspondence between the parties to this action and all subsequent proceedings, clearly indicate the intention on the part of the insurance company and its agents to deal unfairly with the plaintiff, to catch him napping, to place him in default if possible, and then claim a forfeiture. This is always odious in the eyes of the law. That they did not succeed in their nefarious scheme was due more

to their agent's ignorance of the law than to any other element.

Again, the demand was absolutely insufficient to place the plaintiff in default for the very simple reason that it absolutely failed to fix a time and place when the plaintiff might exhibit "the last authentic inventory" or "bills of purchases of stock since the last said authentic inventory."

> "A requirement in a policy that the assured shall produce his books and other designated documents at such reasonable place as may be designated by the company should ordinarily be construed as meaning a reasonable place in the locality where the loss occurred." *Murphy v. Northern British & M. Co.*, 61 Mo. App. 323.
>
> "If the insurer having an office without the state fails to reasonably advise insured of a convenient place within the state where the documents may be produced, he is excused from producing them." *Seibel v. Insurance Co.*, 62 Atl. 101.
>
> "Failure of plaintiff in an action on a fire policy on a stock of goods to produce books and vouchers may not be complained of, there having been no proper demand for their production. *Warrinsky v. Fidelity Surety Co.*, 92 N. Y. S. 771.

A clause requiring assured to produce for examination his books of account at such reasonable

place as may be designated by the company, means a reasonable place in the locality where the insured's property is situated.

*Tucker v. Colonial Fire Ins. Co.*, 51 S. E. 86.

*Aetna Fire Insurance Co. v. Simmons*, 49 Neb. 811, 69 N. W. 125, holds that a statement that a company desires the insured to submit to an examination and the request that he shall name a convenient date at which he will be prepared to do so, without naming any place, is not such a demand as puts him in default where the policy provides for an examination at such reasonable place as shall be designated by the company.

Learned counsel for the insurance company admit that the letter of September 10th, 1912, fails to name any time or place where the plaintiff might produce his "last authentic inventory" and his bills of purchases since said "last authentic inventory," but insists that "the insured absolutely refused to produce any books or papers for inspection at any place whatever, and in addition to this refused to perform any of the terms or conditions of the policy on his part to be performed," in assisting the company in adjusting the loss, stating that he had complied with the law and furnished everything that was required, and that the company's letter to him requesting books and papers settled the matter as far as he was concerned." (Brief p. 58.) This defense is predicated upon the letter written by plaintiff under date of October 11, 1912, to W. G.

Lloyd, adjuster of the insurance company. That letter is as follows:

> "What has struck you? I have complied with the law. Send you with proof of loss *witch* you refuse to receive as such and claimed in your letter that it was a *memorised* list. As far as I am or was concerned that letter closed the matter between you and me. I have been treated *roten* by you. You have never called on me and I never saw you. This has been my first fire and I have had no *exsperince* in *maters* of this kind and want no more. I *inshured payed* my money and have *meet* with a loss and want mine and I am going to have it; and take this from me I have furnished you with every thing covering this my loss.
>
> "WM. BLACK."
>
> "Say you had better save your stamps I will get them just the same with a 2 cent stamp or do you take me for a farmer."

In overuling the motion for non-suit and commenting on the letter of September 10th, 1912, written by the insurance company to Black, and the letter of October 10th, 1912, written by Black to the insurance company, Judge Cushman tersely said:

> " . . . . The provision of the contract requiring that he produce these things is a wholesome provision and it is for the protec-

> tion of the company, but when they have got a provision in there that he shall furnish them at some reasonable place, under the strict construction of the contract against the insurer, it is their duty to designate some reasonable place, and if they meant by this that he produce them in Portland, outside of the state of Washington, the court would be prepared to hold that was an unreasonable place. As I read this letter, your company had rejected his proof of loss, and told him that you would hold it subject to his order. As I read his letter, that is particularly what he is crying out against. He has done all in that matter that he will do, and when he says, 'You have never called on me, and I have never saw you' that left the matter open to your company, and warned you that if you required anything more of him or anything in the line of matters you spoke of, about bills of invoices, his idea was the reasonable place would be down there in that town where he lives and the court thinks so too. (Tr. p. 258.)

What then does the record show as to whether the plaintiff refused to furnish the insurance company with all documents and information that he possessed concerning his loss. The defendant produced W. G. Lloyd, its adjuster, as a witness in its behalf, and he testified that in January, 1913, some

time after this action was commenced, he went to Long Beach in company with Mr. Cole, one of the attorneys for the insurance company, at which place Black was residing, and there they requested Mr. Black to give them a written order on the Bank at Astoria, Oregon, authorizing the bank to permit them to investigate the status of Mr. Black's account with the bank. This Black did without any objection on his part. (Tr. p. 262.) At the same time Black also exhibited to them a bundle of charred bills and invoices that had been partially, but not entirely destroyed in the fire, and at the same time told them he was willing to furnish them all information possible. (Trans. p. 191. This evidence, coming as it does from the insurance company, seems to be rather a conclusive answer to the contention of counsel for the insurance company that Black refused by his letter of October 10th, 1912, to do anything further to and the insurance company in determining the amount of the loss. No one can read the testimony in this case, especially the correspondence, between the parties, without being impressed with the idea that the insurance company was not dealing fairly with the plaintiff.

But it is now for the first time insisted by counsel for the insurance company that the plaintiff *waived* a proper demand upon him to produce his inventories and bills of purchases since the "last said authentic inventory" by his letter of October 11th 1912. If this be true, then why not a waiver instead of a demand plead in the answer filed by the

company. It is a general rule that if a waiver is to be relied upon it must be pleaded.

*Brown v. Fire Ins. Co.*, 5 So. 560;
*Cassimus v. Scottish Union National Ins. Co.*, 33, So. 163;
*Merchants Natl Ins. Co. v. Pearce*, 84 Ill. App. 255;
*Continental Ins. Co. v. Baulne*, 126 Mo. 410, 26 N. E. 119, 10 L. R. A. 843; ,
*Evans v. Queen City Ins. Co.*, 31 N. E. 843;
*Sisk v. Citizens Ins. Co.*, 54 N. E. 804.

## IV.

Pages 63 to 86 of the brief of counsel for plaintiff in error is devoted to a labored attempt to demonstrate that a directed verdict should have been ordered for the insurance company on the theory that the evidence clearly demonstrated that the insured was guilty of fraud and false swearing in violation of the terms of the policy. We might safely dismiss this phase of the case by remarking that this issue was submitted to the jury under apt and appropriate instructions, to which no exceptions were taken, and that their verdict on disputed questions of facts will not be reviewed by this court. However, we are willing to meet counsel on the proposition that the evidence is not even conflicting on the issue of fraud and false swearing. Counsel for the insurance company confuse the ideas of credibility and conjecture. The question presented

here is merely one of credibility of the evidence, and the evidence is all in favor of the insured on the issue of fraud and false swearing. It is, no doubt, true, and it is a wholesome provision of the law that where the insured has been guilty of fraud and false swearing such conduct renders his policy void, and he cannot successfully maintain an action thereof. But who is to determine whether or not the insured is guilty of fraud and false swearing? Is a mere suggestion from counsel for the insurance company sufficient for that purpose? We believe not. Counsel does not seem to appreciate the rule that it is only in rare instances that the trial court should withdraw from the consideration of the jury cases of this character. We believe that the only instance of the court's lawful exercise of this power exists when there is a state of facts in the record which is undisputed, and when such facts do not admit of more than one inference to be drawn therefrom by impartial men. But, on the other hand, if the facts in evidence be controverted, or there is a conflict of evidence, or if men of fair mind might draw different conclusions from uncontroverted facts, then the case must always be submitted to the jury and their verdict is final. Was the evidence such in this case that only one conclusion could be drawn therefrom by imparial men? We think not. Counsel ignores the disputed evidence and calmly proceeds to argue that plaintiff is guilty of fraud and false swearing without even a suspicion of proof upon which to base such an argument. They absolutely

ignore the proposition that on the question as to the value of the case goods, wines, cigars, cigarettes, bitters, champagne, etc., that the insured had in his proof of loss inventoried the same *at the price paid by him to the wholesalers*. For proof of this statement the court has only to read the many depositions taken by defendant. (See deposition of Bickart, Tr. pp. 131-133; Ecklund, Tr. p. 99; Greenbaum, Tr. pp. 94-95; Adams, Tr. pp. 337-338; Brinkley, Tr. pp. 346-347; Cramsie, Tr. p. 353, et al.) As to the value of old liquors contained in barrels, the testimony of William H. Armstrong, (Tr. p. 238), S. A. Madge (Tr. pp. 345-346); and W. A. Hagermeyer (Tr. p. 244) and the plaintiff is particularly convincing.

Counsel for the insurance company made little, if any effort to contradict or discredit the testimony of the witnesses Madge, Hagermeyer, Armstrong and the plaintiff as to the value of the liquor contained in barrels. They only introduced one witness (F. A. Kellog, Tr. pp. 371-375) on this aspect of the case, but no one can read his testimony as printed in the transcript and arrive at any correct understanding about what he was testifying. If it is true as contended for by counsel, that plaintiff put an exorbitant value on his goods such as would indicate fraud and false swearing, then why was it counsel closed the case without introducing the testimony of expert witnesses to show the true value of the articles which it is alleged were over-valued? There is quite a distinction between legal proof and

suspicion, a distinction which counsel for the insurance company seems slow to grasp. We can hardly believe that counsel is laboring under the impression that this court will take judicial notice of the value of different brands of whiskies, and that therefore it was unnecessary to show by testimony that a brand of liquor of the market value of $3.00 to $4.00 per gallon in 1903, could not possibly have a value of $7.00 or $8.00 per gallon some years later. The courts of Kentucky and North Carolina might feel that the law of judicial notice could properly be extended to fit such a case, and that they could arbitrarily decide that question, but counsel for the plaintiff is not willing to concede that this court possesses any such qualification. We have not the time or the inclination to follow counsel in their argument as contained in pages 67 to 86 of their brief in their futile attempt to demonstrate that plaintiff was guilty of fraud and false swearing, for the simple reason that in the last analysis the question was one for the jury to decide, and we have already set forth sufficient testimony to show that that question could not be decided as a matter of law. The trial court fully and fairly instructed the jury on the issue of fraud and false swearing, and counsel for insurance company failed to note any exceptions thereto. Conceding, without admitting, that the plaintiff did place a value on some of his bulk liquors higher than the market price justified, if there was any market price for the same, yet that fact standing alone is not sufficient to convict

plaintiff of fraud or false swearing. The law is that:

> "The sworn statement of insured as to the amount of a loss, although found to be excessive does not constitute false swearing or misrepresentation which will void the policy where it was made in good faith and there was room for an honest difference in opinion as to whether the loss was total or partial." *Spring Garden Ins. Co. v. Amusement S. Co.*, 178 Fed. 519, 102 C. C. A. 29.
>
> "A false statement in the proofs of loss to defeat a recovery must be false to the knowledge of assured and made for the purpose of defrauding the company." *Merritt v. Ins. Co. of North America*, 23 Fed. 245.
>
> "In general, however, the mis-statement, although under oath, if not intentionally false and made with the purpose to defraud does not constitute such fraud or false swearing as to defeat recovery." 19 Cyc. 855-866, Note 96, and authorities there cited.

There was no special finding of the jury, neither is there anything in the record to support the charge of over-valuation, fraud or false swearing.

V.

It is again insisted by counsel for plaintiff in error that the judgment should be reversed because of error in giving and refusing instructions. Error

is assigned to the refusal of the court to give instructions III, IV, VI and XI, requested by the company. However, counsel make no argument in their brief predicated on these asignments. The general charge to the jury so fully and completely covered every phase of the case upon which counsel requested instructions, that we do not wonder that counsel refrains from any argument concerning any alleged error of the court in failing to give the requested instructions. It is fundamental that if a proposition of law is covered by the general charge, it is not error to refuse a specific request covering the same matter. It is also assigned that the court committed error in the giving of a certain instruction requested by counsel for plaintiff as follows:

> "It is provided by the statute of the State of Washington (Sec. 105, Laws of 1911, p. 243) as follows: 'Every insurer who makes insurance upon any building or property or interest therein against loss or damage by fire, and every agent who issues a fire insurance policy covering on any building or property or interest therein, and every insured who procures a policy of fire insurance upon any building or property or interest therein owned by him, is presumed to know the insurable value of such building or property or interest therein at the time such insurance is effected.' Under this provision of the law I charge you that the defendant in-

surance company was presumed to know at the time it issued this policy of insurance in the sum of $5000 covering the property described in said policy and situated in the buildings described in said policy, the value of said property. If it now claims otherwise the burden of proof rests with the defendant to so show by a fair preponderance of the evidence." (Tr. p. 418.)

The exceptions to the instructions refused and to the instructions given cannot be considered for the following reasons:

1st. The exceptions were not timely taken.

2nd. The exception to the instruction above quoted was general and not specific. In other words the exception to the instruction which we have set out above did not direct the attention of the trial court to the precise objection counsel now urges against it. The exceptions were not timely because when taken the jury had retired to consider of their verdict. (Tr. p. 426.) It is the settled law in this circuit that under such circumstances the exceptions will not be considered.

*Yates vs. U. S.* 90 Fed. 57 (9th Cir.)
*Western Union Tel. Co. vs. Baker*, 85 Fed. 690 (9th Cir.)
*Bank vs. McGraw*, 76 Fed. 930 (9th Cir.)
*Johnson vs. Garber*, 73 Fed. 523, C. C. A. 6th;
*Walton vs. U. S.*, 9 Wheat. 658;

*Phelps vs. Mayer*, 15 How. 160; 14 L. Ed. 643; *U. S. vs. Carey*, 110 U. S. 51;

This court in the case of *Arizona & New Mexico Ry. Co. vs. Clark*, 207 Fed. 817, just recently held that exceptions to the giving of instructions where no exceptions were taken thereto while the jury was at the bar, could not be considered though the record recited that before the jury retired the court granted permission to the defendant to embody in its bill of exception, if it should tender one, its objections to the court's instructions more at length and in detail. Counsel for the insurance company insist that a rule adopted by the lower court, which they set forth in their brief, gives them the right to take exceptions to instructions after the retirement of the jury. This rule is not embodied in any statement of facts or bill of exceptions, and is not properly before this court. However, this objection is fully met and answered in the case of *Arizona & New Mexico Ry. Co. vs. Clark*, supra, where the trial court granted permission to take exceptions after the retirement of the jury, and in the case of *Western Union Tel. Co. vs. Baker*, supra, where it was held that even though a practice obtained in the lower court of taking exceptions to the instructions after the jury retired, it did not give the court power to consider an exception which was not reserved at the only time when under the law it could have been reserved, viz., at the time and while the jury were at the bar. Again, the exception to the instruction quoted on

pages 86 and 87 of brief of counsel for plaintiff in error was general in its nature and totally insufficient to call the precise objection now urged against the instruction to the attention of the trial court.

> "An exception not sufficiently specific to call the attention of the court to the particular point claimed to be erroneous cannot be considered by an appellate court." *Montana Mining Co. vs. St. Louis Mining & M. Co.*, 147 Fed. 897, 78 C. C. A. 33.
>
> "To entitle the plaintiff in error to the review of instructions, the exception taken must have been sufficiently specific to point out to the trial court the particular matter of law objected to." *Lafayette Bridge Co. vs Olson*, 108 Fed. 335, 47 C. C. A. 367, 54 L. R. A. 33.
>
> *Cass County vs. Gibson*, 107 Fed. 363, 46 C. C. A. 624.
>
> "An exception to a charge cannot be sustained which fails to call the attention of the court to its particular infirmity." *Porter vs. Buckley*, 147 Fed. 140, 78 C. C. A. 138.
>
> "An exception to an instruction cannot be enlarged upon appeal so as to present an objection not presented to the trial court." *Great Western Ry Co. vs. McCormick*, 200 Fed. 375.
>
> "An assignment of error will not be considered when the exceptions were insufficient

to call the question to the attention of the trial court." *Springer Lithographing Co. vs. Falk*, 59 Fed. 707, 8 C. C. A. 224.

*N. P. Ry. Co. vs. Krohne*, 86 Fed. 230, 2, 9 C. C. A. 674.

At any event the instruction which we have quoted above was a proper one. The instruction does not as contended for by counsel have the effect of "practically directing a verdict in favor of the plaintiff." Its only effect is to inform the jury that at the time the policy was issued that the property covered thereby had an insurable value of $5000.00. Such is the plain terms of the statute which forbids the issuance of a policy in excess of the insurable value of the property covered. Certainly the presumption attaches that the insurance company did not violate the statute. The law imposes some duty upon the insurance company other than that of collecting the premium.

VI.

Counsel for the insurance company on pages 93 and 94 of their brief argue that the lower court was in error in failing to instruct the jury "that if the property was destroyed by the act, procurement, or design of the plaintiff they should return a verdict in favor of defendant."

There are several answers to this contention. It is sufficient to observe that no such question was made and no exception was taken by counsel for the

insurance company to the failure of the court to so instruct the jury.

The court did instruct the jury as follows:

> "The defendant having alleged that the plaintiff caused the fire himself, so far as that affirmative defense is concerned, the burden of proof is upon the defendant and not upon the plaintiff in that regard. . . ." (Tr. p. 415.)

Furthermore, we undertake to say that there was not a scintilla of evidence that in the slightest degree tended to support such a defense, and the court should have withdrawn that defense from the consideration of the jury.

VII.

Counsel also assigned as error (brief p. 93) the refusal of the court to give the following instruction:

> "If you find from the evidence that the plaintiff in his sworn proof of loss, placed an excessive valuation on the whole property burned, or on single portions or quantities thereof, and that such excessive claim was wilfully or carelessly made, then your verdict should be for the defendant."

This proposed instruction omits one essential and necessary qualification, viz: the intent to deceive and defraud.

*Merrill vs. Ins. Co. of N. A.*, 23 Fed. 245.

It is not for the court to say where fraud is to be inferred, for instance from excessive overvaluation on the property in the proof of loss.

*Heldring vs. Svea Ins. Co.*, 54 Cal. 156;
*Goldstein vs. St. Paul Ins. Co.*, 99 N. W. 696;
*Williams vs. Ins. Co.*, 61 Me. 67.

In any event the general charge of the court so completely and fully covered this subject that it is unnecessary to pursue the subject further. Counsel for the insurance company makes no argument on this assignment of error.

On page 91 of brief of counsel for the plaintiff in error they make the statement that the trial judge on the motion for new trial said "he was inclined to believe that the verdict was excessive, but that if the insurance company had selected an agent as bad as they claimed Henry Kayler to be, they must expect to suffer some embarrassment by reason thereof." We have searched the record in vain to find any such statement as counsel attributes to Judge Cushman, and we have no recollection of his having made any such statement. This assertion of counsel, however, is only on a par with their claim that the evidence convicts the plaintiff of fraud and false swearing.

VIII.

It is insisted that the lower court committed error in including interest on the judgment at the rate of six per cent. per annum from the 6th day of De-

cember, 1912. This action was commenced in the state court on that date. As a matter of fact, the judgment should have included interest from the date the same became due under the policy, which was sixty days after the submission of proof of loss, which took place on August 23rd, 1912. In other words interest should have been computed on the judgment from the 23rd day of October, 1912. That there was no error in allowing the interest on the judgment from December 6th, 1912 we cite:

*R. & B. Code* (Wash.) Sec. 6250;
*Wood vs. Cascade Fire Ins. Co.* 8 Wash. 427;
22 Cyc. pp. 1492 and 1530.

In conclusion we have to observe that the case was fairly tried, the rights of the insurance company fully protected, no reversible error is apparent upon the face of the record, the judgment was right and should be affirmed.

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